(14)

Supreme Court, U.S.
FILED
JUL 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1569

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RICHARD H. AUSTIN, Michigan Secretary of State,
and
FRANK J. KELLEY, Michigan Attorney General,
Appellants,

v.

MICHIGAN STATE CHAMBER OF COMMERCE,
a non-profit Michigan Corporation,
Appellee.

On Appeal from the United States Court of Appeals for the Sixth Circuit

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF THE APPELLEE

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July 28, 1989

CASILLAS PRESS INC. — 1717 K STREET NW, WASHINGTON DC 20036 — 223-1220

30 pgs

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INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) and the Allied Educational Foundation (AEF) hereby file this brief as amici curiae with the written consent of the parties.

The Washington Legal Foundation is a non-profit public interest law and policy center with over 120,000 members nationwide that engages in litigation and

administrative proceedings on a variety of issues of concern to its membership. In particular, WLF has championed the First Amendment rights of individuals and businesses in a number of cases before the Court. *See, e.g., Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980); *Pacific Gas & Electric v. Public Utilities of California*, 475 U.S. 1 (1986); *Boos v. Barry*, 108 S. Ct. 1157 (1988).

The Allied Educational Foundation is a non-profit charitable and educational foundation based in New Jersey that is devoted to the expansion of knowledge and education in a broad variety of areas, and has appeared with WLF as amicus before this Court on a number of occasions. Both WLF and AEI believe that the public interest is best served by full and robust debate on electoral issues, and that laws prohibiting such speech are wholly at odds with the guarantee of freedom of speech provided by the First Amendment.

STATEMENT OF THE CASE

The appellee, Michigan State Chamber of Commerce (Chamber), desired to communicate its views to the public at large in 1985 by purchasing a one-quarter page advertisement in the *Grand Rapids Press* (the only major daily in that area). That communication, for the most part, discussed the Chamber's views on important economic issues, particularly those policies that affect the growth of jobs in the State of Michigan. The advertisement concluded by informing the reader that a particular candidate running in a special election shares those concerns, and asked the reader to "elect" that candidate to office. A copy of that proposed advertisement is reproduced in the appendix to this brief, and in the Joint Appendix (J.A.) at 17a. As an independent expenditure, there was no coordination or

communication with the candidate about the placement of the advertisement.

The Chamber, which is a non-profit corporation, was, however, prohibited from communicating its views because it is a felony under Michigan law for an entity that happens to be incorporated to make any expenditure to assist or oppose any candidate, including independent expenditures of the kind the appellee wished to make. Section 54(1) of the Michigan Campaign Finance Act, M.C.L. § 169.254(1). However, media corporations, (§ 169.206(3)(d)) and corporations "formed for political purposes" (§ 169.254(2)) are not prohibited from making such expenditures. In addition, individuals, partnerships, and unincorporated entities such as labor unions are not prohibited under Michigan law from making such expenditures, and are thus free to exercise their First Amendment rights in an uninhibited and robust way. In addition, such unincorporated entities can make direct contributions to political candidates.

Plaintiff filed suit challenging the constitutionality of the Michigan statute as violative of the First Amendment guarantee of free speech and the Fourteenth Amendment's guarantee of equal protection, as well as violative of the Michigan constitution. The district court held that Section 54(1) does not violate the First or Fourteenth Amendments to the Constitution. *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397 (W.D. Mich. 1986). The U.S. Court of Appeals for the Sixth Circuit reversed, finding that the law does contravene the First Amendment. *Michigan State Chamber of Commerce v. Austin*, 856 F.2d 783 (6th Cir. 1988). Accordingly, the court of appeals did not reach the equal protection issue, or whether the law is narrowly tailored to satisfy a compelling

governmental interest in restricting such communications.[1]

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[1] While the special election in question has long past, *amici* submit that this case is not moot. While the court of appeals did not address the mootness question, the district court did, finding that the case falls within the class of controversies "'capable of repetition, yet evading review.'" 642 F. Supp. 397 (W.D. Mich. 1986)(quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978) quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). In *Meyer v. Grant*, 108 S.Ct. 1886 (1988), this Court did not find moot a constitutional challenge to Colorado's law that prohibited the plaintiff in that case from paying petition circulators to gather signatures necessary to put a initiative measure on the ballot for the November 1984 election. *Id.* at 1890, n.2. As the Court stated in *Meyer*, the test for mootness is (1) whether the challenged action in its duration is "'too short to be fully litigated prior to its cessation or expiration'" and (2) whether there is a "'reasonable expectation that the same complaining party would be subjected to the same action again.'" *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).

In both the *Bellotti* and *Meyer* cases, the Court noted that the parties indicated that they planned to engage in the specific actions under challenge in the future. In the case at bar, the candidate in question won the special election. Although the appellee did not specifically allege that it intended to make independent expenditures in the form of "public statement[s] by purchasing ...advertisement[s]" in support of or in opposition to future political candidates (Plaintiff's Complaint, ¶ 14, J.A. 6a), it did allege that it desired "to timely, effectively, and fairly participate in . . . other elections held in the State of Michigan" (*Id.*, ¶ 19; J.A. 7a), and that enforcement of the ban on independent expenditures by corporations would preclude it from "fully and fairly participating in . . . any succeeding election. . . ." *Id.*, ¶ 29; J.A. 9a.

We think that these allegations could be fairly read to mean that the appellee wishes to "participate" in the electoral process not in the general sense, but by making independent expenditures in the future in the form of paid political advertisements of the kind it proffered for the Special Election in 1985, as opposed to making independent expenditures that do not necessarily result in actual speech or communication. In addition, it is amici's understanding that the time from the date a person announces his candidacy for state elective office to the date of the election is usually less than 18 months, a time period determined in *Bellotti* to be insufficient for plenary review. Accordingly, appellee satisfies both parts of the mootness test.

SUMMARY OF THE ARGUMENT

The court of appeals correctly held § 54(1) unconstitutional under the First Amendment's guarantee of freedom of speech. Section 54(1) makes it a felony for a non-profit yet incorporated association to pay for a newspaper advertisement informing the public about its views on important economic issues, and how the citizenry can act to advance those issues by electing a candidate whom the association believes is sympathetic with those concerns. The free and open marketplace of ideas guaranteed by the First Amendment becomes less free and open by excluding from the market certain ideas and views simply because they are funded by a corporate entity. The public needs more information, not less, about issues that affect its well-being and self-governance, especially about candidates for public office who could, if elected, be in a position to act on those concerns. The First Amendment protects the public's interest in receiving information. The public can intelligently weigh the merits of the speech and assess the credibility of the speaker without the draconian and patronizing measure of preventing all such financed speech from reaching their attention.

The state interest advanced to justify the complete ban on the financing of such communications is not sufficiently compelling to overcome the protection of the First Amendment, especially where there has been absolutely no evidence adduced in the district court nor any legislative findings that independent expenditures of

this kind have a corrupting influence. This is not surprising, for as this Court has repeatedly acknowledged, independent expenditures, which are uncoordinated with the candidate and indeed may be unwelcomed by him, do not have the tendency to corrupt the candidate or give the appearance of corruption.

Indeed, since corporations are permitted under the law to expend unlimited treasury funds for a myriad of political purposes (*e.g.*, communications to its members on candidate and political issues; administration of its political action committees, lobbying, contributions to elected officials' officeholder expense funds), one may legitimately ask what evil is prevented by prohibiting the publication of pure speech. Such an unlimited use of treasury funds for political purposes totally undercuts the state's alleged interest in preventing large amounts of corporate money from being used in the political process, and the interest in protecting the rights of the dissenting shareholder.

Even if a governmental interest in limiting large corporations from overwhelming the electorate with too much political speech is compelling, a complete ban on all such speech is not a narrowly tailored or precisely drawn means of serving that interest. The proposed speech in this case was a simple, concise message, that would be published on only one day as a quarter page advertisement in a newspaper, at a cost of approximately $1,100, an amount roughly equivalent to 13 cents from each of the 8,000 members of the Chamber. There is no showing that such a modest independent expenditure would corrupt or appear to corrupt the candidate or dominate the marketplace of ideas, assuming that such a marketplace can have a surfeit of ideas. It would be a felony for the Chamber

even to respond to a voter's legitimate request for information on the Chamber's position on a candidate, for even that modest communication would necessarily entail expenditures for postage, telephone, photocopying, administrative costs, and the like.

Mere administrative convenience achieved by prohibiting *all* independent expenditures by corporate entities is not a sufficient reason for the state to escape its obligation to narrowly tailor its restrictions on pure speech to serve the alleged compelling interest.

Finally, the court of appeals decision can also be affirmed on the grounds that the law violates the equal protection clause of the Fourteenth Amendment in that it does not prohibit such expenditures by individuals, partnerships, or unincorporated associations such as labor unions, or incorporated media organizations.

ARGUMENT

I. MICHIGAN'S LAW PROHIBITING INDEPENDENT EXPENDITURES BY INCORPORATED ENTITIES IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

As is recognized by all the parties, this Court has never expressly held that the state may constitutionally prohibit a corporation from expending funds independently of candidates' campaigns to disseminate its views about those candidates. The lower court correctly held the Michigan statute in question was unconstitutionally applied to a non-profit ideological corporation such as the Chamber, "for it infringes upon speech at the core of the first amendment without a compelling justification." 856 F.2d 783, 790 (footnote

omitted). The court found no actual corruption by such speech, nor any appearance or threat of such corruption, and found that the attributes of the Chamber were sufficiently similar to the attributes of the non-profit corporation in *Federal Election Commission v. Massachusetts Citizens for Life Committee*, 479 U.S. 238 (1986), where the Court struck down as unconstitutional as applied a federal statute similar to the one at bar that prohibited all corporations from making any expenditures, independent or otherwise. *Amici* further submit that even if the Court were to treat the Chamber as more of a traditional "for profit" corporation, the state has nevertheless failed to demonstrate a compelling governmental interest in banning pure speech that is made independently of any candidate.

A. THE MICHIGAN LAW BANS POLITICAL SPEECH THAT LIES AT THE CORE OF THE FIRST AMENDMENT

There can be no question that the speech which the Chamber wishes to make and disseminate is core political speech which deserves the highest protection by the first amendment. As this Court stated in *Buckley v. Valeo*, 424 U.S. 1 (1976):

> [D]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure the unfettered interchange of idea for the bringing about of political and social changes desired by the people' *Roth v. United States*, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498] (1957). . . .In a republic where the people are sovereign, the ability

> of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 [91 S.Ct. 621, 625, 28 L.Ed.2d 35] (1971), 'it can hardly be doubted' that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'

Id. at 14-15. The proposed communication in the case at bar attempted to inform the citizenry about issues of importance to them, and the Chamber's view of the qualifications of a candidate with respect to those issues. In an age of 30-second campaign commercials, sound bites, bumper strips, campaign rhetoric and hoopla, the proposed advertisement is a refreshing piece of serious information about the growth of jobs in Michigan and the expert views of an organization as to where a particular candidate stands on those issues. This communication may very well be the only substantive information that a voter might glean about the candidate before entering the voting booth. At the same time, the Chamber takes the risk that some voters may oppose the Chamber's views on the matter and for that reason may vote against the candidate supported.

The fact that this core political speech is financed by a corporation does not lessen the protection that such speech deserves. As this Court stated in *First National Bank of Boston v. Bellotti*, 435 U.S. 776 (1978):

> If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and

> this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of this speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id. at 780. *See also Pacific Gas & Electric v. Public Utilities of California*, 475 U.S. 1, 8 (1986)(the "identity of the speaker is not decisive in determining whether speech is protected").

Amici recognize that the Court in *Bellotti* dealt with the constitutionality of a law that made it a crime for a corporation to finance expenditures relating to a referendum as opposed to a political campaign. The Court did not foreclose, however, a challenge against laws that prohibit corporate independent expenditures on political campaigns, noting that "Congress *might well be able* to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Bellotti*, 435 U.S. 765, 788, n. 26 (emphasis added). While amici submit that Congress could not be able to demonstrate the existence of such corruption, it is clear that the State of Michigan, in fact, has not made such a demonstration.

B. THERE HAS BEEN NO SHOWING OF A COMPELLING GOVERNMENTAL INTEREST IN BANNING ALL INDEPENDENT EXPENDITURES MADE BY THE CHAMBER

While amici recognize that the prevention of the corruption of candidates is an important governmental interest, such an interest does not, by its mere articulation, justify a sweeping ban on all political speech made by an incorporated entity such as the Chamber. The State of Michigan has failed abysmally to demonstrate that independent expenditures corrupt or tend to corrupt candidates who later become officeholders.

The appellants seem to argue that simply because Miichigan has long had laws on the books preventing such expenditures, that in and of itself is sufficient demonstration that independent expenditures pose a threat to the integrity of the electoral process.[2]

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[2] Aside from the circular reasoning of such a statement, the historical references are misleading and inaccurate. The Appellants state "In 1913, six years after Congress passed the Tillman Act, Michigan enacted the Corrupt Practices Act which banned the use of corporate treasury funds for the payment of election expenses. This statutory ban withstood a constitutional attack in *People v. Gansley*, 191 Mich. 357; 158 N.W. 195 (1916)." Appellants' Brief at 5-6 (footnotes cited omitted). The district court similarly stated, "It does not matter, of course, that there has not been a finding of actual corruption, given that corporate independent expenditures for candidates have been banned since 1913." *Michigan State Chamber of Commerce v. Austin*, 643 F. Supp. 397, 404 (W.D. Mich. 1986). However, the Corrupt Practices Act enacted in 1913 did *not* ban corporate independent expenditures, but only made it illegal to "pay, give or lend, or authorize to be paid, given or lent, any money belonging to such corporation *to any candidate or to any political committee*, for the payment of any election expenses

Appellants' Brief at 5-6, 33. The appellants are simply unable to point to any evidence, however, that independent expenditures have or are likely to have a corrupting influence on candidates who become officeholders.

The district court merely opined, without reference to any supporting evidence, that independent expenditures "*may* . . . create an atmosphere of distrust or the appearance of corruption" (emphasis added) and cited *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 209 (1982). 643 F. Supp. 397, 403-04. The district court's *ipse dixit* certainly is not sufficient to satisfy the scrutiny demanded in this case.

In the first place, the appellants' reliance on cases such as *National Right to Work*, *supra*, and *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981) are inapposite since those cases dealt with "contributions" and not with independent expenditures. Secondly, since independent expenditures are by definition made independently of the candidate without any prior cooperation, the *quid pro quo* that might be attached to a contribution made directly to a candidate is not present. As this Court observed in *Federal Election Commission v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985):

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's

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whatever." 1913 Mich. Pub. Acts 109, § 14. *See People v. Gansley*, *supra*, 158 N.W. 195, 197. The current law, MCL § 169.254(2), is much broader, making it a felony to "make a contribution *or expenditure*," which includes independent expenditures of the kind, which by definition, are not "given" to any candidate or committee.

> campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. [*Buckley v. Valeo*,] 424 U.S., at 47, 96 S.Ct., at 648.
>
> * * *
>
> It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. *On this record*, such an exchange of political favors for uncoordinated expenditures remains a *hypothetical possibility and nothing more*.

Id. at 1469 (emphasis added).

Similarly, the record in the case at bar is bereft of any evidence that independent expenditures cause corruption or are viewed as likely to cause corruption. While the state can take prophylactic measures to prevent corruption, it certainly does not have carte blanche to run roughshod over the First Amendment without any showing that the prophylactic measure was needed. For example, in *Texas v. Johnson*, 57 U.S.L.W. 4770 (1989), this Court held that burning the American flag is "symbolic speech," ruling unconstitutional as applied a Texas statute forbidding desecration of the

flag. The Court rejected as uncompelling the state's interest in preserving the integrity of our nation's symbol as well as prohibiting a breach of the peace that may be occasioned by public flag burning. As for the latter state interest, the Court had no problem second-guessing the wisdom of Texas state legislature's enactment of a prophylactic measures to prevent the breach of the peace. The Court noted that in this particular case, no breach of the peace occurred, and that "[n]o reasonable onlooker would have regarded" the protestor's flag burning as an "invitation to exchange fisticuffs." 57 U.S.L.W. at 4773. While many would sharply disagree with this Court's assessment on that point, *amici* submit that it can be safely assumed that no reasonable citizen would regard the Chamber's proposed advertisement as a corrupting influence on the candidate.[3] Michigan, as do the other states, has laws prohibiting bribery and attempted bribery. There is also a plethora of disclosure laws that are more narrowly tailored to ensure the integrity of the electoral process than the sweeping ban of an entire category of speech.

Appellants make much of the fact that the Chamber has numerous ways in which to participate in the electoral process without having to use its treasury funds to pay for the independent expenditure in

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[3] It should be noted that although the communication involved in this case deals with an independent expenditure that advocates the election of a candidate, the law also prohibits the expenditure of corporate funds to pay for independent expenditures that advocate the defeat of a candidate. While the Chamber did not specifically allege that it intended to make such expenditures, it did not rule them out either. *Amici* submit that while there is no showing that positive independent expenditures cause corruption, it is even less likely that negative independent expenditures would do so. The maker of such an advertisement may be opposing the greater of two evils, with no expectation or desire to obtain any favors from the other candidate not attacked.

question. Appellants' Brief at 52 (Chamber may use its treasury funds, *inter alia*, to pay for the administration and solicitation costs of its political action committee; to contribute to ballot committees; to donate to an elected official's officeholder expense fund; to pay for communicating to its members its views on political candidates; to contribute to political party organizational activities).

All of this electioneering activity that can be lawfully financed by the Chamber's treasury merely undercuts the alleged state interest in preventing corruption or the appearance of corruption by the use of corporate funds to pay for pure speech, as well as the other alleged interest in protecting the objecting shareholder from having treasury funds spent on partisan activities. Ironically, it may very well be that all of these permitted political contributions and expenditures by treasury funds have caused many people to have a negative image of corporate or union political action committees, rather than the modest communication of pure speech proposed to be made by the Chamber with its own funds.

Indeed, Michigan readily admits that the Chamber's Political Action Committee (PAC) could have lawfully paid for the proposed advertisement. Yet the Chamber testified in the court below that because of a media attack on the bona fides of such political action committees, an expenditure by the PAC with the corresponding disclosure that such communication was paid for by the Chamber PAC, would have less credibility, and hence generate more distrust of PACs. J.A. 153a (LaBrant testimony). In other words, it appears that an advertisement financed directly by the Chamber will generate greater credibility and trust than the one paid for by the Chamber's PAC.

Since most of the copy in the proposed advertisement is merely issue discussion rather than express advocacy, the Chamber could easily split it in two for a double display advertisement. The one advertisement could be devoted to a discussion of the issues in the campaign without expressly advocating the election of the candidate who shares those same views (such as the first five paragraphs of the proposed advertisement reproduced in the Appendix hereto). Such an advertisement can be paid for lawfully with the Chamber's treasury funds. The final "Elect Candidate X" message, which can lawfully be financed by the Chamber's PAC, could then be placed in a separate advertisement right next to the issue discussion advertisement. The Chamber could also publish the advertisement in its own newsletter to its members, and encourage them to "pass it along" to a friend or neighbor.

All of this merely demonstrates that the state has woefully failed to show that corporate independent expenditures would cause corruption or the appearance of corruption. The numerous activities that may be financed with treasury funds simply pale in comparison to the modest advertisement the Chamber wishes to make in this case, and thereby calls into question the legitimacy of the state's alleged compelling governmental interest. As this Court noted in *Buckley v. Valeo*, 424 U.S. 1 (1976):

> It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. Cf. *Mills v. Alabama*, 384 U.S., at 220, 86 S.Ct., at 1437.

Id. at 45.

While the Chamber does not propose to expend "unlimited sums" or "obtain improper influence over candidates," the state's complete ban on independent expenditures by corporations is an arbitrary restraint that does not serve any compelling governmental interest. It is simply ludicrous to suggest that if there were any possibility of corruption by the financing of the advertisement by the Chamber, such a possibility would vanish or be diminished if the disclaimer at the bottom of the advertisement were to read "Paid for by the Michigan State Chamber of Commerce PAC," instead of "Paid for by the Michigan State Chamber of Commerce." Indeed, the candidate might appreciate the PAC financed message more, knowing that the aggregate amount of funds expended by that interest group and its PAC were greater than the cost of the advertisement alone, since the Chamber had to expend its own funds to generate the PAC funds that ultimately were used to pay for the advertisement.[4]

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[4] Testimony in the district court indicated that the administrative costs to a corporation may be as high as 50 percent of the amount spent by PAC. (J.A. 103a, 108a) (Mayberry testimony). Thus, an independent expenditure by a PAC in the amount of $2,000 actually represents an aggregate outlay of $3,000 by that interest.

Accordingly, *amici* submit that this content-based ban on speech by incorporated entities is not narrowly tailored to serve a compelling governmental interest even assuming a threat to that interest exists.

II. SECTION 54(1)'S BAN ON INDEPENDENT EXPENDITURES BY CORPORATE ENTITIES VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE THE LAW PERMITS SUCH EXPENDITURES TO BE MADE BY MEDIA CORPORATIONS AND UNINCORPORATED ENTITIES

While the court of appeals did not need to address the appellee's claim that Section 54(1) violates the Equal Protection Clause of the Fourteenth Amendment, this Court can of course affirm on those grounds since the issue was raised and briefed in the lower courts. The appellants opening brief simply dismisses the argument as "meritless," citing to footnote 11 of this Court's decision in *Federal Election Commission v. MCFL*, 479 U.S. 238, 258-259, n.11. Appellants' Brief at 17, n.14. However, the party in that case and in similar cases did not raise an equal protection challenge to the federal legislation. Indeed, unlike the federal legislation which treats corporations and labor unions in a roughly equivalent way, 2 U.S.C. § 441b, Michigan and ten other states prohibit corporate contributions and expenditures, but allow union contributions and expenditures to be made.

It is well established that a corporation is a "person" under the Equal Protection Clause of the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936). The district court in this case properly stated the test to be employed as follows:

> Federal courts consider legislative distinctions presumptively invidious when those distinctions burden the exercise of a fundamental right under the Constitution. *Plyer [v. Doe]*, 457 U.S. at 216-217....In order to survive scrutiny under the Fourteenth Amendment, such distinctions must be precisely tailored to serve a compelling state interest. *Id.* at 217....In this case, section 54(1) of the Act burdens plaintiff's exercise of its First Amendment right to freedom of speech, which is a fundamental right under the Constitution. Therefore, any distinction in section 54(1) between plaintiff and other persons must be *precisely tailored to serve a compelling state interest.*

Michigan State Chamber of Commerce v. Austin, 643 F. Supp. 397, 405 (W.D. Mich. 1986) (Emphasis added). The district court, however, incorrectly concluded that there was no violation of the equal protection clause because of the alleged "unique threat of corporate power to the electoral process." *Id.* As demonstrated in the prior section of this brief, the compelling state interest of preventing corruption by prohibiting independent expenditures is illusory. In addition, if the harm to the electoral process is the expenditure of large sums of money by entities, it is irrelevant whether the entity involved is incorporated or not.

Nor is the distinction between these entities narrowly tailored to serve the alleged compelling state interest. A small dry cleaning establishment that happens to be incorporated is banned from making any independent expenditures, yet an unincorporated union with thousands of members and a large treasury are free to spend unlimited amounts on such expenditures.

Similarly, Michigan's law allowing unlimited expenditures by media corporations violates the Equal Protection Clause. M.C.L. § 169.206(3)(d) excludes from the definition of "expenditure" any "newsstory, commentary, or editorial in support of or opposition to a candidate" by any "broadcasting station, newspaper, magazine, or other periodical or publication." The district court found no violation of the equal protection clause because "[a]ny corporation....may avail itself of the exemption...." 643 F. Supp. at 405. While it is true that the Chamber may publish a magazine or newspaper carrying a commentary on a particular candidate, the only effective way of getting the message across to the electorate as a whole rather than to the Chambers members is by purchasing space in widely circulated newspaper. The law in effect gives a monopoly to corporations owning generally circulated newspapers to inform the electorate about the qualifications of the candidates.

Amici submit that these distinctions cannot survive a casual scrutiny, let alone a strict one, to determine whether a compelling interest is served. Not surprisingly, the lower court failed to refer to *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1976) and *Carey v. Brown*, 447 U.S. 455 (1980) which we believe are dispositive of the issues here. In those cases, the Court struck down state statutes that prohibited picketing near certain buildings and residences, except for certain labor pickets. *Cf. Boos v. Barry*, 108 S.Ct. 1157, 1170 (1988). Similarly, in this case, the state has not demonstrated why expenditures by unincorporated entities are less corrupting than those made by incorporated entities. Accordingly, ban on independent expenditures by incorporated entities cannot survive under the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision of the court of appeals on the grounds that the ban on independent expenditures is a clear violation of the First Amendment, or in the alternative, that such a law violates the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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July 28, 1989

Michigan Needs Richard Bandstra To Help Us Be Job Competitive Again

The Michigan State Chamber of Commerce, an organization of over 8,000 member companies, associations and local chambers of commerce, is committed to making Michigan more competitive for business investment and job creation. With that goal in mind, we'd like to share some facts with the electors in the 93rd House District before they vote in tomorrow's special election.

To be job competitive, Michigan needs to have fair regulatory policies on business regarding such important issues as workers' compensation and we need to encourage greater efficiency in state government by lowering the state personal income tax.

Currently, workers' compensation costs are 20% higher in Michigan than those in neighboring states. Why? Our eligibility standards are not the same as most other states. Too many people are allowed to qualify for too long a period of a time.

Many Grand Rapids businesses are competing with firms in other states having lower regulatory costs. Unless checked, this disadvantage may continue to cost Michigan jobs . . . jobs that are lost when businesses leave Michigan, expand out of state, or when out-state companies seeking to expand don't locate here in Michigan.

To ensure that Michigan is job competitive, we need legislators at the State Capitol who will show courage and stand up to special interests that advocate greater regulation and taxes.

The Michigan State Chamber of Commerce believes Richard Bandstra has the background and training to do the best job in Lansing for the people of the 93rd House District. We believe he will work to reduce workers' compensation costs and for an early rollback of the personal income tax rate.

The State Chamber is committed to job development in Michigan. We believe Richard Bandstra shares that commitment.

On Monday June 10th,
Elect Richard Bandstra
State Representative
93rd House District
Special Election

MICHIGAN STATE CHAMBER OF COMMERCE

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